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DRAFTED BY L:MDSANDLER

APPROVED BY L:MBFELDMAN

ARA/BR - MS. ELTZ (SUBSTANCE)

JUSTICE - MR. RISTAU

----- 071972

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FM SECSTATE WASHDC

TO AMEMBASSY BRASILIA PRIORITY

INFO USIA/GC WASHINGTON

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E.O. 11652: N/A

TAGS: ACOM, BR

SUBJECT: SUITS AGAINST USG IN BRAZILIAN COURTS

1. THIS CONCERNS STEPS TAKEN BY EMBASSY, UNDER 2 FAM 284, TO NOTIFY DEPARTMENT PROMPTLY OF RECENT LITIGATION, PARTICULARLY LABOR SUITS, INVOLVING USG.
2. IT IS IMPERATIVE, TO PROTECT INTERESTS OF USG, THAT BOTH THE DEPARTMENT AND DOJ (DEPARTMENT OF JUSTICE) BE IMMEDIATELY INFORMED (A) OF ANY LABOR SUIT OR OTHER LITIGATION IN BRAZIL INVOLVING USG, AND (B) OF ANY DEVELOPMENTS IN SUCH LITIGATION.
3. CABLES CONCERNING LITIGATION SHOULD BE MARKED PRIORITY, ATTENTION LEGAL ADVISER, INFO JUSTICE DEPARTMENT, CIVIL DIVISION - FOREIGN LITIGATION.
4. UNDER NO CIRCUMSTANCES SHOULD THE EMBASSY RETURN TO A LIMITED OFFICIAL USE

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COURT OR TO THE BRAZILIAN FOREIGN OFFICE ANY LEGAL PAPERS,

WITHOUT EXPRESS DIRECTION OF THE DEPARTMENT.

5. AS STATED IN 2 FAM 284, IT IS THE RESPONSIBILITY OF DOJ TO REPRESENT USG AND ITS AGENCIES AND INSTRUMENTALITIES IN COURT. TO ENABLE DOJ TO DISCHARGE ITS RESPONSIBILITIES, THE DEPARTMENT AND DOJ MUST BE GIVEN NOTICE OF SUIT AT THE EARLIEST PRACTICABLE OPPORTUNITY BY AN INITIAL REPORT, AS REQUIRED BY SEC. 284.3(A).

6. THE INITIAL TELEGRAPHIC REPORT SHOULD BE FOLLOWED UP AS SOON AS POSSIBLE WITH THE MORE DETAILED LITIGATION REPORT CALLED FOR BY SEC. 284.3(B). POST SHOULD ATTACH TO THE LITIGATION REPORT COPIES OF ALL DOCUMENTS RECEIVED FROM THE COURT, TOGETHER WITH ENGLISH TRANSLATIONS THEREOF, AND GIVE DETAILS OF HOW SERVICE WAS MADE (E.G., MAIL, BY PROCESS SERVER, BY DIPLOMATIC NOTE) AND ON WHOM. FURTHER DEVELOPMENTS IN THE CASE MUST ALSO BE REPORTED.

7. DEPARTMENT AND DOJ ARE AWARE THAT IN LABOR DISPUTES BRAZILIAN LAW PROVIDES FOR ONLY A 5-DAY PERIOD WITHIN WHICH EMPLOYER MUST RESPOND TO SUIT. ALL AGENCIES CONCERNED AGREE THAT IT IS IMPOSSIBLE TO GATHER THE RELEVANT INFORMATION, RETAIN AND INSTRUCT COUNSEL, AND BE PREPARED TO SUBMIT A DETAILED AND SUBSTANTIAL RESPONSE TO A SUIT WITHIN THIS TIME FRAME.

8. DOJ HAS REPEATEDLY RAISED QUESTION WITH BRAZILIAN COUNSEL HOW USG CAN OBTAIN RELIEF FROM THIS UNREASONABLY SHORT PERIOD PRESCRIBED BY LABOR CODE. IT HAS BEEN COUNSEL'S VIEW THAT AN APPROACH THROUGH DIPLOMATIC CHANNELS TO FOREIGN MINISTRY SEEKING AN EXTENSION OF TIME WILL IN ALL LIKELIHOOD BE UNPRODUCTIVE. (FOREIGN MINISTRY MAY EITHER DECLINE TO BECOME INVOLVED IN LITIGATION INVOLVING FOREIGN STATES OR, EVEN IF WILLING TO ASSIST, MINISTRY MAY BE UNABLE TO COMMUNICATE WITH COURT WITHIN REMAINING TIME TO OBTAIN REQUISITE TIME EXTENSION. IN EITHER CASE, NONAPPEARANCE BY USG WITHIN SPECIFIED TIME MAY RESULT IN DEFAULT JUDGMENT.

9. EXPERIENCE TEACHES THAT COURTS IN BRAZIL, AS ELSE-
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WHERE, ARE PREPARED TO GRANT FAIRLY LIBERAL EXTENSIONS OF TIME WITHIN WHICH A FOREIGN STATE MUST RESPOND TO A SUIT IF A TIMELY REQUEST IS MADE, AND IF COURT IS INFORMED (A) THAT POST ITSELF LACKS AUTHORITY TO RESPOND TO NOTICE OF SUIT; (B) THAT RESPONSIBILITY FOR DEFENSE OF SUIT UNDER U.S. LAW IS VESTED IN DOJ IN WASHINGTON;

(C) THAT POST HAS REFERRED PAPERS WHICH WERE RECEIVED TO

DOJ IN WASHINGTON; (D) THAT IN CONSEQUENCE POST REQUESTS A 60-DAY EXTENSION OF TIME; AND (E) THAT SUCH REQUEST FOR ADDITIONAL TIME IS MADE WITHOUT PREJUDICE TO ANY DEFENSES WHICH USG MAY ULTIMATELY RAISE IN COURT, EXCEPT DEFENSE OF LACK OF NOTICE.

10. WITH RESPECT TO FUTURE LAWSUITS IN BRAZIL, IF IT APPEARS THAT INSUFFICIENT TIME HAS BEEN GRANTED TO ENABLE EMBASSY TO COMMUNICATE WITH DEPARTMENT AND DOJ AND TO PREPARE LITIGATION REPORT, EMBASSY IS REQUESTED TO COMMUNICATE DIRECTLY WITH COURT BY MOST EXPEDITIOUS MEANS AND TO REQUEST A 60-DAY EXTENSION OF TIME. IF FOR ANY REASON COURT IS NOT DISPOSED TO GRANT 60-DAY EXTENSION, EMBASSY SHOULD REQUEST A MINIMUM OF 30 DAYS.

11. FURTHER, IF COURT IS NOT DISPOSED TO GRANT AN EXTENSION OF TIME ON BASIS OF COMMUNICATION RECEIVED FROM EMBASSY, EMBASSY IS AUTHORIZED TO INSTRUCT LOCAL BRAZILIAN ATTORNEY EMPLOYED BY EMBASSY TO MAKE A FORMAL APPLICATION TO THE COURT IN COMPLIANCE WITH LOCAL PROCEDURE AND CUSTOM. IN SUBMITTING LITIGATION REPORT REQUIRED BY 2 FAM 284, EMBASSY SHOULD INCLUDE PRECISE INFORMATION ON APPLICABLE TIME LIMITATIONS, AND WHAT STEPS HAVE BEEN TAKEN BY EMBASSY TO SEEK AN APPROPRIATE EXTENSION OF TIME.

12. DEPARTMENT AND DOJ NEED PROMPT EMBASSY RESPONSE TO REQUESTS IN PARAS. 13, 14 AND 15, BELOW.

13. RE CLAIM OF A.M. VEIGA HANRIOT AGAINST USIS
(BRAZIL 424): DOJ NEEDS RESPONSE TO ITS DIRECT CABLE TO EMBASSY OF JANUARY 23, 1976.

14. RE CLAIM OF LUIS GOZAGA DA SILVA AGAINST USIS
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(BRAZIL 10421): DOJ HAS DISCUSSED CLAIM WITH ATTORNEY SERGIO SARDENBERG, AND HAS REQUESTED HIM TO EXAMINE COURT DOCKET AND REPORT ON HISTORY OF THIS LITIGATION. THIS CLAIM WAS ORIGINALLY MADE IN SUIT BEFORE 3RD LABOR COURT IN BRAZILIA IN JANUARY 1970 (SEE RIO 172, 9 JANUARY 1970). EMBASSY ADVISED DEPARTMENT 5 JUNE 1970 (RIO 3848) THAT LABOR COURT RULED IT WAS WITHOUT JURISDICTION, AND FORWARDED RECORDS TO FEDERAL COURT FOR REVIEW. SUBSEQUENTLY, EMBASSY ADVISED ON 14 JULY 1971 (RIO 5039) THAT SECOND SUIT WAS TARTEREBIRPLAINTIFF ON SAME CAUSE OF ACTION. DOJ AUTHORIZED REHIRING OF DR. JARDIM, WHO REPRESENTED USG IN FIRST SUIT. IN JUNE 1973, JARDIM REPORTED TO DOJ THAT COURT OF APPEALS HAD RULED ON 12 APRIL 1973 THAT ONLY FEDERAL COURTS, AND NOT LABOR COURTS, WERE COMPETENT TO HEAR CLAIMS AGAINST FOREIGN

STATES. THERE WAS NO FURTHER INDICATION FROM EMBASSY OR JARDIM THAT SUIT WAS CONTINUED OR REINSTITUTED IN THE FEDERAL COURTS. IN VIEW OF THIS CHECKERED HISTORY, DOJ UNABLE TO FORMULATE A LITIGATION POSITION UNTIL IT HAS RECEIVED COMPREHENSIVE REPORT ON BACKGROUND OF LATEST LAWSUIT REPORTED BY EMBASSY ON 21 OCTOBER 1975 (BRAZIL 9150).

15. RE CLAIM OF ANITA BERNSTEIN AGAINST JBUSMC (BRAZIL 10864): DOJ HAS DISCUSSED CLAIM WITH ATTORNEY SERGIO SARDENBERG AND INSTRUCTED HIM TO FILE A PRECAUTIONARY APPEAL WHEN DEFAULT JUDGMENT IS FORMALLY SERVED. BASIS OF APPEAL WILL BE THAT LABOR COURT WAS INCOMPETENT TO ENTERTAIN CLAIM AGAINST USG, AND THAT ONLY FEDERAL COURTS HAVE JURISDICTION TO HEAR SUCH CLAIMS. IN THE MEANTIME DOJ WISHES TO EXAMINE WITH CARE THE MERITS OF THE CLAIM. ATTORNEY SARDENBERG HAS EXPRESSED OPINION THAT MRS. BERNSTEIN IS IN ALL LIKELIHOOD ENTITLED TO THE SEVERANCE PAYMENT WHICH SHE CLAIMS. EMBASSY OR JBUSMC REQUESTED TO EXPLAIN WHY IT BELIEVES THAT WHERE THERE ARE TWO SEPARATE PERIODS OF EMPLOYMENT WITH MORE THAN A 90-DAY BREAK, NO SEVERANCE PAY IS DUE UNDER BRAZILIAN LAW FOR THE FIRST EMPLOYMENT PERIOD. SARDENBERG QUESTIONS THE SOUNDNESS OF THAT INTERPRETATION. IF EXAMINATION OF MERITS PROVES THAT MRS. BERNSTEIN'S CLAIM IS SOUND, LIMITED OFFICIAL USE

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JBUSMC WILL BE DIRECTED TO SETTLE CLAIM EXTRAJUDICIALLY.

16. AS TO THE DEFENSE OF LABOR CLAIMS GENERALLY, DEPARTMENT AND DOJ WISH TO STRESS AGAIN THAT IT IS NOT THE POLICY OF USG TO CLAIM SOVEREIGN IMMUNITY FROM SUIT IN ORDINARY LABOR CASES. IN USG'S VIEW, SOVEREIGN IMMUNITY IN SUCH CASES IS CONTRARY TO INTERNATIONAL LAW. IF A COURT HAS JURISDICTION TO HEAR A LABOR CLAIM AGAINST USG, CLAIM WILL BE DEFENDED ON MERITS OR ON OTHER PROCEDURAL GROUNDS (E.G., STATUTE OF LIMITATIONS; NAMING OF IMPROPER DEFENDANT), BUT NOT, RPT NOT, ON GROUNDS OF SOVEREIGN IMMUNITY. INGERSOLL

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